

# EXHIBIT B



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# Transcript of Hearing

**Date:** May 29, 2024

**Case:** Rojo -v- Homer Tree Care, Inc.

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Transcript of Hearing  
Conducted on May 29, 2024

1 (1 to 4)

1	IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
2	COUNTY DEPARTMENT, LAW DIVISION
3	- - - - - x
4	ALEJANDRO ROJO, : PLAINTIFF, :
5	v. : Case No.
6	HOMER TREE CARE, : Commercial Calendar N
7	INC., : 23 L 8588
8	DEFENDANT. : - - - - - x
9	
10	
11	
12	B E F O R E:
13	JUDGE MARY COLLEEN ROBERTS
14	
15	MOTION HEARING
16	Virtual via Zoom
17	Wednesday, May 29, 2024
18	12:38 P.M. Eastern Time
19	
20	
21	Job No.: 537350
22	Pages: 1 - 41
23	Reported By: Mary Vazquez-Jaime, CCR
24	

1	A P P E A R A N C E S
2	ON BEHALF OF THE PLAINTIFF: ADAM FEUER, ESQUIRE DJC LAW, PLLC 140 South Dearborn Street Suite 1610 Chicago, Illinois 60603 312.442.5555 adam@teamjustice.com
3	
4	ON BEHALF OF THE DEFENDANT: DANIELLE M. KAYS, ESQUIRE FISHER PHILLIPS 10 South Wacker Drive Suite 3450 Chicago, Illinois 60606 312.346.8061
5	
6	ALSO PRESENT: ANGELICA SMITHE, COURT CLERK
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1	P R O C E E D I N G S
2	MS. KAYS: Thank you, Your Honor. So
3	again, you know, not to reiterate everything that
4	was in our papers, but the high level points.
5	This is our motion to dismiss. We move under
6	2-619 as well as 2-615. I'll address the 2-619
7	argument first and happy to address the other
8	arguments.
9	Our 2-619 argument is that my client,
10	Homer Tree is exempt under BIPA. Section 25(e) of
11	BIPA very clearly states that the statute does not
12	apply to a contractor with a local or State
13	agency. And it says that the exemption applies to
14	all sections of BIPA.
15	Under that exemption, we argue that the
16	statute does not apply to my client because my
17	client was a contractor of both state and local
18	governments of -- local units of government during
19	the entirety of the plaintiff's employment. Now,
20	as a reminder, this is a single plaintiff lawsuit;
21	this is not a class action. Regardless, during
22	the time that Mr. Rojo, the plaintiff, was working
23	for my client, our client was a government
24	contractor that entire time. They contracted with

1	2	4
2	IDOT and hundreds of local government contracts	
3	during the entirety that he claims there were	
4	alleged violations of BIPA. On top of it, we have	
5	submitted a declaration to support that. But	
6	we've also submitted a declaration that says that	
7	the plaintiff worked on those government contracts	
8	for my client.	
9	Now, the key issue that I think the	
10	plaintiff takes up is, what does "when working	
11	for" mean. Now, again, under BIPA, the language	
12	specifically says that: Nothing in this Act shall	
13	be construed to apply to a government contractor,	
14	subcontractor, agent of a State agency or local	
15	unit of government when working for that State	
16	agency or local unit of government.	
17	Now, we do understand the Court's position	
18	about the cases that have decided this issue. But	
19	the issue of "when working for" in the statute is	
20	very clear. Because of that, there is no need to	
21	go to legislative intent. The issue is if the	
22	defendant was a contractor and if it was working	
23	for that unit of government at the time that it	
24	collected or disseminated biometric information.	
	Regardless to whether that is clear or	

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1 not, plaintiff has not cited to a single decision  
 2 or authority that discusses of the legislature's  
 3 intent of this 25(e) section of BIPA. Instead,  
 4 it's clear that "when working for" means it's a  
 5 temporal -- it's a temporal matter. And again,  
 6 there's no evidence, there's nothing that  
 7 contradicts that my client was a government  
 8 contractor during the entire time that the  
 9 plaintiff was working; and on top of it, that he  
 10 worked on those contracts.

11 All that is required under the statute,  
 12 under the plain meaning, is that these alleged  
 13 violations occurred during the same period of  
 14 time. And we have established that. There's no,  
 15 you know, authority that says that the legislature  
 16 meant anything else. But then again, it doesn't  
 17 matter because it's not unambiguous.

18 And just as a practical matter, what  
 19 they're arguing is that we need to only apply this  
 20 exemption to BIPA if a person is specifically  
 21 working on a day or moment or time on a government  
 22 contract. And that, classically speaking, is  
 23 ludicrous. That would mean that a defendant would  
 24 have to -- or a government contractor would have

1 to segregate his work force every single day, it's  
 2 ever changing, to make sure that they comply with  
 3 BIPA. Some days and some employees or not for  
 4 others on other days? That's unmanageable.  
 5 There's nothing in the statute that says that that  
 6 is required. It doesn't say that this -- nothing  
 7 in the statute applies to individuals who are  
 8 working for a local government contract or a state  
 9 government contract. It says that applies to  
 10 entities when they are working.

11 And so because of that, this exemption  
 12 applies to this case. It defeats plaintiff's  
 13 claims under 2-619. And we ask that the Court  
 14 dismiss the case entirely on that basis.

15 We do cite to the Enriquez decision, and  
 16 the Court took up the same time -- or took up the  
 17 same issue, and it said that what matters is  
 18 whether the entity was working for the unit of  
 19 government during the period that the alleged  
 20 violations occurred. Therefore, we ask you to  
 21 reject plaintiff's arguments on that note.

22 I can go in to the rest of our motion,  
 23 but --  
 24 THE COURT: Let's do this, I'll let

5  
 1 Mr. Feuer respond and then you can reply. And  
 2 then we'll go into the 615. How about that?  
 3 MS. KAYS: Sure, that sounds good.  
 4 MR. FEUER: Thank you, Your Honor.  
 5 THE COURT: Just give me one second.  
 6 MR. FEUER: Of course, yeah.  
 7 THE COURT: Okay. One more second.  
 8 Okay. Go ahead.  
 9 MR. FEUER: Thank you. So, you know, Your  
 10 Honor, as you noted at the outset, this specific  
 11 issue is not settled law. The defendant asserts  
 12 that it is -- that it was settled by Enriquez,  
 13 which is an unpublished First District decision.  
 14 However, that case did not address the specific  
 15 question at issue today in this case at all, and  
 16 it's unpublished and not binding in any event.  
 17 But the bottom line that the Court today  
 18 is free to rule on this issue consistent with what  
 19 it believes is the most fair. There's no binding  
 20 interpretation of what the "when working for"  
 21 modifying clause to the government contractor  
 22 exemption means, whether it should be broadly  
 23 construed as an all-or-nothing temporal  
 24 limitation, as the defendant urges, or whether a

6  
 1 context-dependent inquiry is required to determine  
 2 the scope and contours of the exemption.

3 Under the exemption as advocated by  
 4 defendant, it would completely swallow the rule.  
 5 Any entity with a single government contract in  
 6 place at the time the biometric scanning occurs,  
 7 no matter how attenuated to the contract all that  
 8 company's biometric scanning may be, would enjoy  
 9 blanket immunity from BIPA.

10 I think we give some top-line  
 11 hypotheticals in our response brief that the  
 12 defendant doesn't really address. Supermarkets,  
 13 gas stations, and school cafeterias, all of these  
 14 types of entities are specifically called out by  
 15 name by the literature in -- in passing BIPA. All  
 16 of these entities have some amount of private  
 17 entity contracting with government entities.  
 18 Under the defendant's reading of the law, it would  
 19 make them all exempt from the protections of BIPA.

20 I thought of another hypothetical that I  
 21 wanted to discuss. There is a McDonald's on the  
 22 Great Lakes Navy base, right. The McDonald's on  
 23 the Great Lakes Navy base is there pursuant to one  
 24 or several government contracts. If the

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3 (9 to 12)

1 McDonald's scans its employees' biometrics for  
2 timekeeping on that Navy base pursuant to that  
3 contract, those employees are not subject to the  
4 protect -- are not protected by BIPA, because the  
5 McDonald's operating under that government  
6 contract would be exempt by the government  
7 contractor exemptions. If the law is extended the  
8 way the defendant urges, all the employees of  
9 McDonald's in the entire state of Illinois would  
10 have no protections under BIPA by virtue of the  
11 one McDonald's on a government base with a  
12 government contract.

13 That is totally inconsistent with the  
14 legislature's insertion of the "when working for"  
15 language as a modifier of State agency, and unit  
16 of government. The defendant's interpretation  
17 reads that modifier right out of statute. If  
18 that's what the legislature had intended to do, it  
19 could have just stopped and wrote: Nothing in  
20 this Act shall be construed to apply to a  
21 contractor, subcontractor, or agent of a State  
22 agency or local unit of government, period. It  
23 didn't do that. It added, comma, when working for  
24 the government, right. So it's not the case that

10 if you're a contractor you get blanket immunity.  
1 The defendant calls this a temporal  
2 limitation and says that the contours of it are  
3 well-settled and defined by Enriquez. But  
4 Enriquez didn't even address this issue. The  
5 holding in Enriquez was very narrow because the  
6 facts were so unique and specific. In that case  
7 NPI, Inc., which is Navy Pier, Incorporated,  
8 existed exclusively for the purpose of operating  
9 and managing Navy Pier. It had no other purpose.  
10 It did that under a contract with the Metropolitan  
11 Pure Expansion Authority, which is the government  
12 entity that owns the land of Navy Pier and its  
13 buildings, right.

15 Enriquez gives no guidance on what the  
16 contours of the so-called temporal limitation  
17 "when working for" actually are, because Navy Pier  
18 was never not working for the government entity.  
19 All of its work was pursuant to performing that  
20 government contract. So this issue wasn't even  
21 raised. The sole question in that case was  
22 whether Navy Pier, Incorporated satisfied the  
23 definition of a government contractor, even though  
24 its legal relationship was one of the government's

11 lessee. And the Court found that it did, saying  
2 that it performs governmental services on behalf  
3 of MPEA pursuant to a contract, and MPEA retains a  
4 level of oversight. It was not the Court -- the  
5 Enriquez Court was not called upon to define the  
6 scope of any temporal limitation called for by  
7 "when working for." It only answered the very  
8 narrow question presented in that case. It's a  
9 narrow holding that should be limited to its  
10 facts, and it remains unpublished.

11 As Your Honor noted, there are some sister  
12 court citations that, you know, both parties have  
13 cited. I'd like to discuss a couple of them if  
14 that's okay. The defendant --

15 THE COURT: Can I ask you a question?

16 MR. FEUER: Go ahead, Judge, of course.

17 THE COURT: And don't -- it's your  
18 position that while your client worked for Homer,  
19 that Homer also had contracts with nongovernmental  
20 units; is that correct?

21 MR. FEUER: Yeah, that's undisputed by  
22 Homer's declaration.

23 THE COURT: Everybody agrees with that?

24 MR. FEUER: Yeah, everybody agrees with

12 that.  
1 THE COURT: And it's also your position  
2 that your client, while he worked for Homer and  
3 did -- he was a climber, right? He did  
4 governmental work -- he did work on governmental  
5 contracts. Also during his employ, he did work  
6 for private contracts, correct?

8 MR. FEUER: That is correct.

9 THE COURT: Okay.

10 MR. FEUER: And so because BIPA -- this is  
11 an individual action and the claim accrues with  
12 each scanner transmission, was required as a fact  
13 specific inquiry under into what projects Mr. Rojo  
14 was working on when, and when he was doing work on  
15 government contracts. There's no liability for  
16 those scans or transmissions; those are exempt,  
17 right. But when he's not doing work on government  
18 contracts, the defendant cannot claim the 25(e)  
19 exemption.

20 THE COURT: Yes, that's your position.

21 MR. FEUER: That's our position, yes.

22 THE COURT: Okay.

23 MR. FEUER: And so, you know, the  
24 defendant cites to *Miranda versus Pexco* and argues

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4 (13 to 16)

1 that that case is more persuasive than the case  
 2 that we point to, which is, sorry, Navarette  
 3 versus Josam Acquisitions.  
 4 THE COURT: And again, Navarette and  
 5 Miranda are both decisions by Courts that are at  
 6 (indiscernible) level, right, they're not  
 7 appellate.  
 8 MR. FEUER: Yes.  
 9 THE COURT: Right?  
 10 MR. FEUER: They're both Cook County  
 11 Chancery Court decisions and came to the opposite  
 12 conclusions.  
 13 THE COURT: Right. But they're not  
 14 persuasive and they're not -- they're not  
 15 precedential, right?  
 16 MR. FEUER: They are not precedential --  
 17 THE COURT: They're just what my friends  
 18 over at Chancery are doing.  
 19 MR. FEUER: Sure, yeah. And if the Court  
 20 wishes to look at them as persuasive authority or  
 21 not, for guidance or not, that's up to the Court  
 22 to consider.  
 23 THE COURT: Yes.  
 24 MR. FEUER: We urge the Court to look at

13 1 out the other law or -- or were code of laws that  
 2 BIPA is trying to interact with and not step on.  
 3 And with -- with 25(e), you know, it's --  
 4 it was written as intended to prevent conflict  
 5 with principles of sovereign and tort immunity  
 6 that are applicable to government contractors when  
 7 working for the government. The insertion of that  
 8 adverbial modifier "when working for" narrows the  
 9 exemption by tying it to the work that's actually  
 10 being performed with or for the government.  
 11 And we think this is consistent with how  
 12 tort immunity provisions have always been  
 13 interpreted. We cite a couple of cases in our  
 14 brief for this one, United States Supreme Court  
 15 case, that government contractors don't get  
 16 blanket tort immunity; they get it for the acts  
 17 they perform in the discharge of their government  
 18 contracts.  
 19 So we think that any other view of this  
 20 exemption would cause exemption to swallow the  
 21 rule and render the modifying phrase "when working  
 22 for" completely superfluous, which is not  
 23 consistent with statutory interpretation.  
 24 THE COURT: Thank you.

14 1 25(e) and read Section 25 of BIPA as a whole to  
 2 aid its inquiry into the scope and limitations of  
 3 this government contractor exemption. You have to  
 4 read -- we urge the Court to read it as all the  
 5 other exemptions in Section 25, which harmonize  
 6 BIPA with existing frameworks that are already in  
 7 place to regulate certain industries or to prevent  
 8 conflict with other laws, right.  
 9 So for example, 25(a), it prevents BIPA  
 10 from conflicting with codes of civil procedure and  
 11 criminal procedure and rules of evidence, right.  
 12 So biometric data can be freely used in court  
 13 proceedings without violating BIPA.  
 14 25(b) harmonizes BIPA and prevents it from  
 15 conflicting with HIPAA and the X-Ray Retention Act  
 16 as to covered entities under those laws, hospitals  
 17 and doctors.  
 18 25(c) harmonizes BIPA and prevents it from  
 19 conflicting with the Gramm-Leach-Bliley Act as to  
 20 covered financial institutions.  
 21 25(d) prevents BIPA from conflicting with  
 22 the Private Detective and Locksmith Act of 2004,  
 23 Right.  
 24 Those sections, those exemptions, all call

16 1 Okay. Ms. Kays, your reply to that?  
 2 MS. KAYS: Yes, Your Honor. Plaintiff's  
 3 arguments are just that, they are arguments. They  
 4 are not reflected anywhere in the plain language  
 5 of the statute. The statutory language is clear,  
 6 and so all these arguments about what should be  
 7 included, what should not, have no place in the  
 8 Court's decision and interpretation of language of  
 9 the statute. The Illinois Supreme Court has made  
 10 clear that the language of the statute is what  
 11 applies and what prevails.  
 12 They also argue about legislative intent  
 13 and what they believe this exemption means under  
 14 BIPA. But again, there's no citation to the  
 15 legislative intent in this case, nor do we even  
 16 need to go there because the language is clear and  
 17 plain. The exemption applies to private entities  
 18 except for the exceptions listed in BIPA. And  
 19 that exception is for any entity that has a  
 20 government contract during the period it is  
 21 working on that government contract.  
 22 Even though their arguments are not  
 23 supported by the plain language or by the  
 24 legislative intent, they try to appeal to senses

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5 (17 to 20)

1 by saying that this exemption would completely  
 2 swallow the rule. That is not the issue. The way  
 3 they're arguing it actually would take it exactly  
 4 the other way; it would completely alleviate the  
 5 exemption and rid government crews of the  
 6 exemption.

7 The hypotheticals that they bring up are  
 8 not evidence. There is no evidence at all with  
 9 all these other, you know, McDonald's or anything  
 10 like that, what those government contracts are or  
 11 anything like that. And just because an entity --  
 12 you know, we don't have any of those facts here,  
 13 nor do they apply.

14 We are looking here at the facts of this  
 15 case where the plaintiff worked on projects under  
 16 the IDOT and local government contracts during the  
 17 entirety of his position as a climber. There's  
 18 also no evidence to contest that the plaintiff  
 19 didn't work on those government contracts. Our  
 20 declaration says that he worked on those  
 21 government contracts during his employment. And  
 22 plaintiff has not provided any counter declaration  
 23 to dispute that. That's all argument. There's  
 24 nothing even in the pleadings that discusses that.

1 You know, going back to the cases they've  
 2 cited, I would say that Enriquez actually does  
 3 address what it means to be working for. There's  
 4 a section in Section 23 of the decision that we  
 5 would suggest is very persuasive.

6 THE COURT: Wait. You're saying that --  
 7 you're citing the unpublished decision that  
 8 Enriquez --

9 MS. KAYS: As persuasive --

10 THE COURT: Sure.

11 MS. KAYS: Not precedential, not binding,  
 12 but persuasive.

13 THE COURT: Sure. I get that.

14 MS. KAYS: And they look at what does it  
 15 mean for an entity to be working on a government  
 16 contract. And they say that that phrase means  
 17 that the unit -- or the company, the entity, is  
 18 working for a local government contract in some  
 19 type of services relationship. It doesn't look at  
 20 the temporal, you know, the -- I guess the time  
 21 frame of the government contract. It doesn't look  
 22 at whether the individuals were working on a  
 23 contract. But regardless, it does say that it's  
 24 simply -- "working for" simply means being in a

17

1 services agreement.

2 I would argue, you know, that is relevant  
 3 because, again, there's -- they're looking at it  
 4 broadly to say that it just -- it just -- the  
 5 language depends on if you are engaged in this  
 6 services agreement.

7 THE COURT: But can I ask you a question  
 8 about the Enriquez case?

9 MS. KAYS: Sure.

10 THE COURT: I don't recall. Was that a  
 11 pleadings decision or was that a motion for  
 12 summary judgment decision?

13 MS. KAYS: That was on a motion to  
 14 dismiss, Your Honor. I'll confirm that. Yes.

15 THE COURT: Okay.

16 MS. KAYS: And that's because this is --  
 17 again, this is a requirement in order to find a  
 18 private entity is -- you know, is covered by BIPA.

19 The other exemptions that the plaintiff  
 20 has pointed out regarding the health care  
 21 exemptions, again, those have recently been  
 22 brought before the Illinois Supreme Court, and  
 23 every single time they look at the plain language  
 24 of the statute. We would argue that that is what

18

1 is relevant here. There is no evidence to show  
 2 that this defendant was not a government  
 3 contractor during the period. And, you know,  
 4 their arguments are not legally sound. But also  
 5 they just -- as I mentioned earlier, it would be  
 6 ridiculous for a defendant to have to treat each  
 7 of his individuals differently depending on the  
 8 hour of the day.

9 THE COURT: Okay. Give me one second.

10 (Pause in proceedings.)

11 THE COURT: Okay. I just want to clarify  
 12 something with respect to Enriquez. With  
 13 Enriquez, the company that she worked for, it had  
 14 a contract with the Metropolitan Pier and  
 15 Exposition, right --

16 MR. FEUER: Correct.

17 THE COURT: -- Which is a unit of  
 18 government. It didn't say anything in the  
 19 opinion, I just went through it real cursory  
 20 again, that the contractor that Enriquez worked  
 21 for, that contractor also had contracts with  
 22 private entities. It specifically only talked  
 23 about her boss, you know, contracting for -- or  
 24 her actually working for Navy Pier, government

19

20

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6 (21 to 24)

	21		23
1 contractor, right? There's no -- there's no 2 indication that that entity had worked in the 3 private sector.		1 he's worked on those contracts. And if I may, 2 Your Honor, the statute doesn't say that when a 3 person is working on a government contract, it 4 says an entity when working on a government 5 contract. And --	
4 MR. FEUER: That's correct. Navy Pier, 5 Incorporated is a not-for-profit organization 6 that's sole existence is tied to operating Navy 7 Pier on this contract from MPEA. It has no --		6 THE COURT: Got it.	
8 THE COURT: Okay. Okay. That's what I -- 9 yes.		7 MS. KAYS: And we are -- we are the 8 entity; we were a government contractor that 9 entire time. We have said that plaintiff worked 10 on those contracts throughout his employment. And 11 there's nothing in the statute that says that the 12 exemption doesn't apply on an individual basis.	
10 And you agree with that, Ms. Kays? Navy 11 Pier, or is it -- NPI is solely contracting with 12 the government. It has -- the opinion does not 13 identify that it also had contracts with private 14 entities. It did not -- the opinion does not talk 15 about NPI working also with private business. You 16 agree with that?		13 THE COURT: Okay. Okay. So your 14 position, Ms. Kays, is that the statutory language 15 is clear, and that statutory language is -- bear 16 with me.	
17 MS. KAYS: Yes, I agree with that.		17 MS. KAYS: I have it if you'd like.	
18 THE COURT: Okay. And that is different 19 from your client, who has government contracts and 20 private contracts, right? Homer has private 21 contracts, right?		18 THE COURT: No, I have it. No, I want 19 it -- I found it.	
22 MS. KAYS: That is correct, Your Honor. 23 However --		20 740 ILCS, Section 25(e) says: Nothing in 21 this Act shall be construed to apply to a 22 contractor, subcontractor, or agent of a State 23 agency or local unit of government when working 24 for that State agency or local unit of government.	
24 THE COURT: Okay.	22		24
1 MS. KAYS: -- there is no evidence at all 2 that plaintiff worked on those private contracts. 3 What we have said is that they were a --		1 I need to point out that I am persuaded by 2 Mr. Feuer's argument that if the language of this 3 statute wanted to say that the -- nothing in this 4 Act shall be construed to apply to a contractor, 5 subcontractor, or agent of a State agency or local 6 unit of government, it could have stopped there. 7 However, the Court must consider that phrase when 8 working for that State agency or local unit of 9 government.	
4 THE COURT: Well, okay. But then it would 5 be -- I mean, we're in the pleadings stage. Of 6 course there isn't evidence at this point, right? 7 We haven't done discovery.		10 And so in considering that, this Court 11 cannot find right now that there's an affirmative 12 matter that negates this complaint. There's a 13 question of fact as to whether or not this comes 14 into play. And because there's a question of 15 fact, I can't find that there is an affirmative 16 matter that this exemption that negates 17 plaintiff's complaint.	
8 MS. KAYS: But, Your Honor, if I may, 9 we've submitted a declaration under 2-619 saying 10 that since 2018 to the time of this declaration, 11 the plaintiff worked on projects under the IDOT 12 and local government contracts --		18 So for purposes of this pleading, statute, 19 and the fact that the case that -- the unpublished 20 case that you're relying on for persuasive 21 authority dealt with an entity that didn't have 22 any government -- nongovernment contracts, I can't 23 find that this -- this complaint should be 24 dismissed with prejudice under 619. So for the	
13 THE COURT: Right. And --			
14 MS. KAYS: -- during his employment.			
15 THE COURT: And did --			
16 MS. KAYS: There is also --			
17 THE COURT: Did you also indicate --			
18 I'm sorry. I just violated my rule.			
19 Sorry, Mary.			
20 Is there any -- your declaration, you're			
21 saying that the plaintiff did not work on any			
22 nongovernmental projects.			
23 MS. KAYS: There's nothing in the evidence			
24 to say that. What we're saying is that since 2018			

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7 (25 to 28)

	25		27
1 reasons I've just stated, the motion as to 619 is 2 denied.		1 So to the extent that our allegations fall 2 short of that, I would be happy to amend it. You 3 know, to be frank, this is one of our earlier 4 complaints, and I think we're doing them a little 5 different now. So if the Court would permit it, I 6 would be glad to amend the 15(a) count to more 7 clearly allege that defendant failed to have a 8 retention policy in place at the time that it 9 scanned its biometrics and failed to actually 10 destroy its biometrics consistent with its policy 11 with BIPA.	
3 I think we have some things to talk about 4 with respect to 615. We have a five -- is it a 5 five-count complaint?		12 THE COURT: And I think you need to get a 13 little more specific than that, sir. I mean, how 14 does it affect your client? Where's the harm? 15 The defendant has a right to know what he's 16 being -- what they're being accused of and they 17 have the right to have the opportunity to respond. 18 I mean, you can put what you just said in, but 19 really, where's the right of action if you're not 20 alleging specifically, to some sense specific, how 21 your client's been harmed.	
6 MR. FEUER: It's a three-count complaint, 7 Judge, I think.		22 So count 1 is dismissed with leave to 23 amend.	
8 THE COURT: I didn't mean to add. 9 Three-count complaint.		24 Count 2 then, Ms. Kays?	
10 And, Ms. Kays, do you want to just briefly 11 state your concerns about the matter in which 12 the -- each of these counts are pled or the 13 complaint is pled?	26	1 MS. KAYS: Your Honor, so count 2 falls 2 under Section 15(d). There are no facts that 3 supports a claim that there was any disclosure. 4 You know, I posit that there is no disclosure. 5 But regardless, we can't -- you know, the Illinois 6 pleading standards do require facts, not just 7 assumptions, not just conclusions, not just 8 parroting of the statute. The plaintiff has not 9 cited, you know, cases -- they cite cases saying 10 that the standard should be different if there's a 11 vendor versus not a vendor. However, again, they 12 don't cite cases that -- that pertain to the 13 section -- excuse me -- 15(d) allegations or 14 violations. And, you know, Courts have agreed 15 that there needs to be some facts to support that 16 there has been a disclosure. So we ask that this 17 count also be dismissed.	28
14 MS. KAYS: Yes, absolutely. So starting 15 with Section 15(a), it involves the requirement 16 that the defendant have a policy to destroy 17 biometric information and keep that policy. 18 There's -- the Courts have held, with respect to 19 that specific section, that that only is a public 20 duty, it's not a private right, unless there is -- 21 unless the plaintiff has been aggrieved. And that 22 under Section 15(a) specifically, there's an 23 allegation that the defendant failed to destroy 24 biometric information.		18 THE COURT: So there has been an allegation that the plaintiff has been aggrieved in some way. And your position is that count 1 doesn't delineate any way that the plaintiff has been aggrieved; is that correct?	
15 THE COURT: Okay.		19 MR. FEUER: That's right.	
16 Mr. Feuer, what's your position on 17 that? I personally don't see anything 18 specifically saying that.		20 THE COURT: Go ahead, Mr. Feuer.	
17 MR. FEUER: Yeah, 15(a) imposes a panoply 18 of duties. There's three distinct duties: The 19 duty to develop a data retention policy, a duty to 20 publicly disclose it, and the duty to comply with 21 it by destroying the biometrics when the company's 22 purpose for using them has ceased or within three 23 years after employment ends, whichever comes 24 first.		21 MR. FEUER: We don't cite cases that say 22 the standard should be different. We say that the 23 standard is different. In cases against an 24 employer, the case law sort of roundly holds that allegations of a dissemination to a payroll company are sufficient for purposes of	

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<p>1 stating a claim under 15(d) of BIPA.</p> <p>2 You know, we don't know this specific</p> <p>3 details about the dissemination between Homer and</p> <p>4 its vendors; that's something that we need</p> <p>5 discovery to understand. We do know the name of</p> <p>6 the payroll company, and we could amend the</p> <p>7 complaint to add that and some more facts that we,</p> <p>8 we may -- that Mr. Rojo may have that form the</p> <p>9 basis of why he believes his biometric data was</p> <p>10 transmitted to ADP, you know, consistent with our</p> <p>11 understanding of how these systems generally work.</p> <p>12 So our hands are sort of tied at this stage</p> <p>13 without the benefit of discovery. And the case</p> <p>14 law that we have cited we think is reasonably</p> <p>15 clear that, you know, when you're not suing, like,</p> <p>16 a data processing technology company or having</p> <p>17 nebulous claims of data sharing, it's a</p> <p>18 straightforward allegation that the biometric</p> <p>19 information was captured by the scanner and was</p> <p>20 transmitted in the form of a mathematical</p> <p>21 representation, which is biometric information to</p> <p>22 ADP for the purposes of payroll processing. I</p> <p>23 don't think that we need more than that. But if</p> <p>24 the Court disagrees, we would like an opportunity</p>	<p>1 apologize, I apologize. Count 3. 15(a), do you</p> <p>2 have an issue with count 2? No, no, I apologize.</p> <p>3 Let me back up.</p> <p>4 Count 2 is 15(b). Count 3 was 15(b).</p> <p>5 That's what you just talked about right, Ms. Kays?</p> <p>6 MS. KAYS: Yes, Your Honor.</p> <p>7 THE COURT: What about count 2?</p> <p>8 MS. KAYS: I don't believe that we</p> <p>9 brought -- if you can give me a moment. I don't</p> <p>10 think we filed a motion to dismiss that count.</p> <p>11 But I mean, to be honest, Your Honor, the</p> <p>12 allegations in the complaint we feel are cookie</p> <p>13 cutter and sparse and don't have facts to support</p> <p>14 them in any of the claims.</p> <p>15 THE COURT: So, Mr. Feuer, you're correct,</p> <p>16 paragraph 65 does go to count 2, and it's on the</p> <p>17 Court's motion then that it is dismissed with</p> <p>18 leave to amend to be made more specific --</p> <p>19 consistent with the Court's position on count 1.</p> <p>20 And count 3, the only thing that I would</p> <p>21 like to say at this point with count 3 is that</p> <p>22 it's the same, it's just too sparse; it's just too</p> <p>23 many conclusions; it's not specific enough. It</p> <p>24 needs to be briefed up. This is a very important</p>
30	32
<p>1 to try to flesh this out a little bit more.</p> <p>2 THE COURT: Well, I do think that is --</p> <p>3 it's -- there's -- like paragraph 65, defendant</p> <p>4 knew or was reckless in not knowing that biometric</p> <p>5 timekeeping systems would be subject to the</p> <p>6 provisions of BIPA. You know, what I expect with</p> <p>7 these allegations that you're putting forth is not</p> <p>8 conclusions, not suppositions, but, you know,</p> <p>9 facts, we're a fact-pleading jurisdiction.</p> <p>10 So count 2 is dismissed with leave to</p> <p>11 amend. And you need to fill in the blanks.</p> <p>12 Don't -- the defendant doesn't have to guess, nor</p> <p>13 does the Court have to guess at what you're trying</p> <p>14 to get at. There's a lot that you can -- you can</p> <p>15 add in here with respect to your -- the allegation</p> <p>16 of dissemination to notify the -- or at least put</p> <p>17 the defendant on notice as to what they have to</p> <p>18 respond to.</p> <p>19 MR. FEUER: Understood, Judge. Just</p> <p>20 for --</p> <p>21 THE COURT: Yes, sir.</p> <p>22 MR. FEUER: Sorry, count 15(d) is count 3,</p> <p>23 that's the dissemination, so --</p> <p>24 THE COURT: Count 2 -- 15(a). I</p>	<p>1 case, as all cases are.</p> <p>2 MR. FEUER: We agree, Judge.</p> <p>3 THE COURT: But you guys are on the</p> <p>4 cutting edge of new law that's being created and</p> <p>5 looked at. So the more information that you can</p> <p>6 get into this complaint the better able I will be</p> <p>7 able to resolve the issues.</p> <p>8 MR. FEUER: Understood. So 1, 2, and 3</p> <p>9 are dismissed with leave to replead.</p> <p>10 THE COURT: Certainly, yes. How long is</p> <p>11 it going to take you?</p> <p>12 MR. FEUER: 14 days.</p> <p>13 THE COURT: Oh.</p> <p>14 MR. FEUER: I can take more if the</p> <p>15 Court -- let's say 21, give me some breathing</p> <p>16 room.</p> <p>17 THE COURT: I'll give you 21.</p> <p>18 MR. FEUER: Thank you.</p> <p>19 THE COURT: And then, Ms. Kays, you want</p> <p>20 28 to review and determine whether or not you're</p> <p>21 going to answer or file a responsive pleading?</p> <p>22 MS. KAYS: Yes, Your Honor. And just one</p> <p>23 more note. I think the recklessness allegation</p> <p>24 you --</p>

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1       THE COURT: Yes.		1       damages. So a plaintiff can prevail on a BIPA	
2       MS. KAYS: -- you brought them up in		2 case without proving any negligence or	
3 count 2.		3 recklessness, in our view. But that would not	
4       THE COURT: Yeah.		4 entitle the plaintiff to damages for negligence or	
5       MS. KAYS: You think that they are in each		5 damages for recklessness, they would have to prove	
6 of the counts. And so we ask that that -- you		6 some level of culpability being entitled to those	
7 know, that the reason for dismissal be on that		7 damages, but not to prove their case, which would	
8 basis as well.		8 entitle them to attorney's fees and injunctive	
9       THE COURT: Yes. Let me just identify		9 relief that the biometrics be dealt with according	
10 something with respect to the recklessness.		10 to the law.	
11       So, Mr. Feuer, your response to the		11       THE COURT: So if I can make an analogy.	
12 plaintiff -- so this is what I don't understand:		12 In a personal injury case, the pleading of willful	
13 Plaintiff asserts that -- I'm sorry.		13 and wanton behavior, it's not necessarily pled in	
14       Defendant asserts that you have, the		14 the negligent count, it's a separate count;	
15 plaintiff, has failed to plead recklessness or		15 correct? That -- when it gets pled. So that -- I	
16 intent as required under BIPA. And your position		16 mean, I think in personal injury cases you have to	
17 is you're not required to plead recklessness or		17 actually be given leave by the Court to file a	
18 intent because they're not essential elements of		18 willful and wanton count. Is that -- I don't	
19 the claim under BIPA. Yet, your complaint pleads		19 think anyone disagree with me on that. And I'm	
20 recklessness. Why? It seems confusing. You say,		20 not saying that that's suggested here.	
21 I'm pleading recklessness, and then you're like,		21       MR. FEUER: Yeah.	
22 well, I am not required to.		22       THE COURT: But what I'm hearing you say	
23       MR. FEUER: Yeah, Judge --		23 is that you're pleading it because it affords you	
24       THE COURT: What are you going to do?		24 the opportunity to go after other forms of relief,	
	34		36
1       MR. FEUER: Our position is that it's a --		1 such as payment of attorney's fees.	
2 it's a measure of damages that the factfinder can		2       MR. FEUER: The statutory damages that are	
3 determine after liability has been established.		3 available to plaintiff are available based on the	
4 And so pleading a culpability standard is not		4 level of culpability that the plaintiff can	
5 required because it's a strict liability statute.		5 ultimately prove. So we plead the levels of	
6 But there's some divergence of opinion on those		6 culpability that we intend to prove, either both	
7 points, and so, you know, because we're seeking		7 or in the alternative, in order to alert the Court	
8 recklessness damages, we -- we called that out in		8 and the factfinder and opposing counsel of what	
9 our complaint that that is -- that that is a level		9 our claim is about and what we're seeking. I	
10 of culpability that we're going to seek to prove		10 think that we would be entitled to win a case	
11 in order to be entitled to the higher of the two		11 without respect to culpability, negligence or	
12 statutory damage awards. Courts have held that		12 recklessness, and that would entitle us to	
13 there's -- there really isn't any need to, you		13 attorney's fees, costs of the case, and injunctive	
14 know, plead specific facts beyond what we've pled		14 relief if applicable. I don't think that requires	
15 to at least state negligence. The Courts have		15 proven culpability.	
16 also stricken recklessness allegations that are		16       But culpability is -- while it's not an	
17 pled similar to the way we have with leave to		17 element of the claim, it's a term reflecting --	
18 replead them.		18 negligence and recklessness, as we say in our	
19       So, you know, the law isn't super clear on		19 brief, were terms reflecting degrees of	
20 this, but I think that it is relatively clear that		20 culpability that we will ultimately attempt to	
21 negligence and recklessness are not elements of a		21 prove at trial. And I think that, you know, the	
22 BIPA claim; they're -- they are standards of		22 cases that we cite support that the allegations --	
23 damages that -- standards of culpability that must		23 specifically with respect to number 65 that you	
24 be met in order to obtain measures of liquidated		24 pointed out, there have been cases, you know,	

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1 cases in the Northern District, published 2 opinions, that discuss -- alleging that the 3 defendant violated a law in 2024 that's been in 4 effect since 2008 is a sufficient allegation to 5 state the recklessness standard. Whether -- you 6 know, obviously, more facts will need to be 7 deduced to prove recklessness. But there is BIPA 8 case law which holds that that is a sufficient 9 allegation to plead it.		1 it. I've learned a lot. And we just need a -- we 2 start at 21 to amend, 28 to respond, to either 3 answer or otherwise plead. And what's it, 4 about -- that's almost 50 days.	
10 MS. KAYS: May I?		5 So how about, Angie, can we come back for 6 status about 60 days out?	
11 THE COURT: Yes, you may. Just give me 12 one second.		7 COURT CLERK: Yes. We can do July 29 at 8 9:30.	
13 Okay. Yes, please.		9 THE COURT: Okay. Continue for status, 10 July 29th at 9:30.	
14 MS. KAYS: Your Honor, I mean, as this 15 Court knows, the pleadings standards in federal 16 court are different than in state court. The 17 cases they cite are not binding nor applicable. 18 And, you know, we've cited a number of cases by 19 your fellow colleagues that do find that if they 20 want to seek the heightened standard for damages, 21 that they need to file -- or they need to submit 22 facts to support why this was reckless.		11 MS. KAYS: Your Honor, if I may, I'm gone 12 that week.	
23 Essentially what they're saying is that, 24 well, we should have known. But that's not		13 THE COURT: That's fine.	
1 willful or reckless conduct; that goes back to 2 negligent conduct. For them to seek heightened 3 damages in this case at the level that they are 4 seeking, we posit that this Court should dismiss 5 their claim without any facts to support it. And 6 some Courts have dismissed it with prejudice.	38	14 MS. KAYS: Can we instead look at the 15 week, like, after the 6th?	
7 THE COURT: So I think I'm just going to 8 go back to the fact that Illinois is a 9 fact-pleading jurisdiction, and that the whole 10 idea is for everybody to know, going into the 11 litigation, what it's about. And so because 12 there's really no guidance from the Appellate 13 Court and the Courts seem to be all over the place 14 just where to land on this, if you're going to say 15 their mental state was reckless, give some facts 16 to lead to that conclusion. Don't state the 17 conclusion and just leave it there. Provide us, 18 provide the Court, provide the defendant, with 19 some information that will -- that substantially 20 can point to that.		15 THE COURT: Of May -- May.	
21 MR. FEUER: Understood, Your Honor. We'll 22 endeavor to do that, absolutely.		17 MS. KAYS: August, yes.	
23 THE COURT: Okay. That's easy. Thanks. 24 This has been a really good hearing. I appreciate		18 THE COURT: That's fine. So our 19 coordinator is out sick today and so we have -- 20 Angie, did she give you any days in August 21 or should we throw a dart and see what works?	
		22 COURT CLERK: I suppose I'll throw a dart 23 and then --	
		24 THE COURT: Throw a dart. Let's see.	
1 willful or reckless conduct; that goes back to 2 negligent conduct. For them to seek heightened 3 damages in this case at the level that they are 4 seeking, we posit that this Court should dismiss 5 their claim without any facts to support it. And 6 some Courts have dismissed it with prejudice.	39	1 COURT CLERK: What about maybe August 1st.	
7 THE COURT: So I think I'm just going to 8 go back to the fact that Illinois is a 9 fact-pleading jurisdiction, and that the whole 10 idea is for everybody to know, going into the 11 litigation, what it's about. And so because 12 there's really no guidance from the Appellate 13 Court and the Courts seem to be all over the place 14 just where to land on this, if you're going to say 15 their mental state was reckless, give some facts 16 to lead to that conclusion. Don't state the 17 conclusion and just leave it there. Provide us, 18 provide the Court, provide the defendant, with 19 some information that will -- that substantially 20 can point to that.		2 THE COURT: Are you still going to be 3 gone?	
21 MR. FEUER: Understood, Your Honor. We'll 22 endeavor to do that, absolutely.		4 MS. KAYS: Yes. I think that is the same 5 week. So the week of August 6th, please.	
23 THE COURT: Okay. That's easy. Thanks. 24 This has been a really good hearing. I appreciate		6 THE COURT: Yeah, let -- let me give you a 7 date.	
		8 COURT CLERK: I know the 5th through the 9 9th won't work for the Court.	
		10 THE COURT: Correct. That's where I was 11 going. How about the 12th, would that work?	
		12 MR. FEUER: There's nothing on my 13 calendar, which must be a mistake, so -- must be a 14 glitch. But I'm sure that -- we'll make that work 15 on the plaintiff's end.	
		16 THE COURT: I mean, it's just a status. 17 Somebody can jump in.	
		18 MR. FEUER: Exactly.	
		19 MS. KAYS: Yeah. Thank you, Your Honor.	
		20 THE COURT: You're welcome. And, yeah, 21 we'll just go from there.	
		22 (Proceedings conclude at 1:34 p.m.)	
		23	
		24	

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1 CERTIFICATE

2  
3 I, MARY VAZQUEZ-JAIME, a Certified Court  
4 Reporter of the State of New Jersey, do hereby  
5 CERTIFY that the foregoing is a true and accurate  
6 transcript of the Motion Hearing as taken  
7 stenographically by and before me at the time,  
8 place and on the date hereinbefore set forth.

9 I DO FURTHER CERTIFY that I am neither a  
10 relative nor employee nor attorney nor counsel of  
11 any of the parties to this action, and that I am  
12 neither a relative nor employee of such attorney  
13 or counsel, and that I am not financially  
14 interested in the action.

15  
16 *Mary Vazquez - Jamie*

17 \_\_\_\_\_  
18 MARY VAZQUEZ-JAIME, CCR  
My commission expires June 30, 2024  
19 License No. XI00382  
20 Dated: June 8, 2024

21  
22  
23  
24

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